92-1223

(1)

Supreme Court, U.S.
JAN 6 1993
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1992

WILLIAM D. SANDERS,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner,
William D. Sanders

A. QUESTIONS PRESENTED FOR REVIEW

(1) Whether or not there was probable cause for the stopping of Sanders' vehicle?

(2) Whether or not what transpired, according to the proof, shows that the stated reason for the traffic stop was, in fact, a pretext for an unauthorized search and seizure?

(3) Whether or not the Affidavit in support of a search warrant application establishes sufficient probable cause?

(4) Whether or not the good faith exception to the exclusionary rule should apply to the search of the Sanders' residence?

B. PARTIES TO THE PROCEEDINGS

Ed Bryant and Van Vincent, United States Attorney and Assistant United States Attorney, represented the United States of America before the District Court for the Western District of Tennessee, Western Division. Mr. Bryant and Joseph C. Murphy, Jr. represented the Government before the Court of Appeals for the Sixth Circuit.

At the District Court level, James D. Causey and Emmett R. Hall, III served as defense counsel for William D. Sanders. Mr. Causey represented Mr. Sanders through the appeal to the Court of Appeals for the Sixth Circuit.

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D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit has not been recommended for full text publication. A copy of the Opinion is included in the Appendix, separately presented.

E. JURISDICTIONAL STATEMENT

(1) The judgment sought to be reviewed was decided and filed October 11, 1991.

(2) The Defendant did not file a Petition for Rehearing En Banc nor has Defendant petitioned for an extension of time within which to file his Petition for Certiorari.

(3) The Petitioner anticipates no cross-petition for certiorari.

(4) The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

F. RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

(1) Fourth Amendment to the United States Constitution

(2) Fourteenth Amendment to the United States Constitution

(3) Rule 12 of the Federal Rules of Criminal Procedure

(4) Rule 41 of the Federal Rules of Criminal Procedure

G. STATEMENT OF THE CASE

1. Statement of the Case

On April 9, 1990, the United States District Court for the Western District of Tennessee returned an indictment against William D. Sanders. Count I alleged that he unlawfully, knowingly and intentionally possessed with the intent to distribute approximately 90 grams of methamphetamine in violation of Title 21 U.S.C. §841(a)(1). Count II charged Mr. Sanders with knowingly and intentionally carrying and using a firearm, during and in relation to a drug trafficking crime in violation of Title 18 U.S.C. §924(c).

On May 1, 1990, Sanders filed a Motion to Suppress. The Defendant moved the Court to suppress all evidence obtained as a result of the unlawful arrest and search of the Defendant while operating his ve-

hicle on March 9, 1990 in Obion County, Tennessee. He further moved for suppression of all evidence obtained as a result of the subsequent search of his residence.

On May 14, 1990, the Honorable Julia Smith Gibbons referred the Motion to Suppress Evidence to the Magistrate for hearing.

On August 29, 1990, Magistrate James Allen presided over the suppression hearing. On September 13, 1990, Magistrate Allen filed his Proposed Findings of Fact, Proposed Conclusions of Law and Recommended Disposition, denying ~~the~~ Defendant's Motion to Suppress.

Defendant filed a Motion to Amend and Supplement Motion to Suppress Pursuant to Franks v. Delaware, 438 U.S. 154 (1978), which the Court denied.

Sanders entered a plea of guilty to Count I. The Court took an Alford plea with respect to Count II.

On February 11, 1991, the Defendant filed his Notice of Appeal.

The Court entered its Judgment on February 14, 1991, finding the Defendant guilty of the following offenses: possession with intent to distribute a Schedule II controlled substance (methamphetamine) and use and carrying of a firearm during and in relation to a drug trafficking crime. The Court sentenced Mr. Sanders to one hundred and six (106) months.

On October 11, 1991, the Sixth Circuit affirmed the District Court's decision.

2. Statement of the Facts

The United States called the following witnesses at the suppression hearing: Bart McIntyre, Jerry Vastbinder, Larry Ross and Nickie Sadler. The Defendant testified in

his own behalf and also introduced a video tape.

a. Testimony of Bart McIntyre, Special Agent, Bureau of Alcohol, Tobacco and Firearms.

On March 9, 1990, Agent McIntyre met with Larry Ross, Barry Callahan, Jerry Vastbinder, and Nickie Sadler, officers with various law enforcement agencies who had agreed to conduct surveillance on a residence on Wolf Creek Road in Obion County, Tennessee. According to "surveillance information" the residence may have been involved in drug trafficking operations.

Agent McIntyre and Agent Callahan, also with the Bureau of Alcohol, Tobacco and Firearms, conducted the surveillance from a wooded area. At approximately five-thirty or a quarter to six, Agent McIntyre observed a pickup truck at the

house. The man and woman occupying the truck stayed ten or fifteen minutes and then left.

Around seven-thirty or a quarter to eight, a second pickup truck arrived with two males and a large dog. After approximately twenty minutes, both men exited the house carrying beer bottles in their hands. They urinated in the front yard of the house.

At approximately 8:30, Sanders left his residence by truck.

On cross-examination, Agent McIntyre testified that he had receive a "phone call from another law enforcement agency" and nobody requested that he do the surveillance based on their information. His agency determined that an investigation needed to be performed. The Government objected when defense counsel asked who related the information to him. The Mag-

istrate overruled the objection. Agent McIntyre testified that information was received from the Drug Enforcement Administration. When asked who (sic) the Drug Enforcement Administration was, the witness objected to answering because there was an ongoing investigation. The Court did not permit the defense to follow this line of questioning.

Agent McIntyre testified that he did not know Sanders' identity until he was arrested, although he knew that the house was occupied by a member of the Hell's Angels. Agent McIntyre then testified that Lt. Vastbinder stated that Vastbinder had information that a Mr. Sanders in the McConnell Community on Wolf Creek Road had been distributing narcotics. The Government objected to the defense's inquiry as to how many people were involved in the investigation. In ruling on the objec-

tion, the Magistrate stated: "I'm not going to consider any of this information that he had before he set up this surveillance as being the basis for probable cause." The defense, however, persisted in its inquiry into the registration on the vehicles observed in front of the residence. The Court ruled that, if the Government took the position that it could not reveal the names of the individuals visiting Sanders' home, then the presence of the vehicles as an element of probable cause could not be considered because the Defendant was entitled to come forward and say that these people were there for an innocent reason. The Court further ruled that the Government's objection was overruled and that counsel for the Defendant could proceed with this line of questioning. If, however, counsel for the Government directed a wit-

ness not to answer the question, then the Court would not consider the information of the vehicles or their presence there as being part of the probable cause.

b. Testimony of Jerry Vastbinder, Criminal Investigator, Obion County Sheriff's Department.

Vastbinder did not perform the actual surveillance of the house, as he and Deputy Nickie Sadler were positioned to the west of the house. Either Ross or Kildee radioed Vastbinder and Sadler with information that there was a vehicle heading east. Ross and Kildee followed the vehicle.

Trooper Ross radioed Vastbinder and Sadler, requesting that Vastbinder and Sadler catch up with him to stop the vehicle.

Vastbinder and Sadler caught up with Ross and Kildee at the South Fulton City

Limits. Vastbinder observed that Sanders was turning left off 45 East onto the Highway 45 Bypass around South Fulton.

Vastbinder passed a couple of vehicles. When he reached the vehicle carrying Ross and Kildee, Ross pulled over to let him pass. Vastbinder testified that the vehicle driven by Sanders went off the right side of the road, crossing the sideline several times. Vastbinder further testified that Sanders' vehicle tailgated the vehicle in front of him. Vastbinder testified that he felt that Sanders was driving under the influence. Vastbinder turned on the blue light and pulled Sanders over at the intersection of Highway 51 and the Bypass.

Deputy Sadler approached Sanders' vehicle and asked him to step from the vehicle back to Vastbinder. Sanders walked toward the back of his truck. Vastbinder

asked him for his driver's license. Sadler informed Vastbinder that Sanders had a gun in the seat. Vastbinder placed Sanders under arrest for possession of an unlawful weapon. The officers did not run a field sobriety test on Sanders. Vastbinder did not give him a ticket for driving under the influence, reckless driving, crossing lanes, speeding, tailgating, following too closely, or any other traffic offense. Sanders had a valid driver's license.

Vastbinder testified that he followed Sanders' vehicle for two miles, and all of that time, Ross was also following it. Vastbinder travelled behind Ross. When he passed Ross, he followed Sanders for perhaps a quarter of a mile. He testified that, prior to that time, he had seen Sanders move out of his lane. He did not see him cross the center line nor could he

recall the vehicle in front of Sanders. He could not testify as to how close Sanders' vehicle was to the vehicle preceeding him. Sanders' vehicle did not strike the vehicle in front of him nor did the vehicle speed up to get out of the way. There was no flashing of lights between them. Vastbinder testified that the speed limit is fifty-five at the place of the stop.

Prior to the surveillance, Vastbinder had been by the house and knew that Sanders lived there. He had checked tag numbers on vehicles at the house. Counsel for the Defendant asked to whom the tag numbers were registered. The Government objected. The Magistrate sustained the objection to the line of questioning in regard to tag numbers of persons visiting the Sanders' residence prior to the date of the arrest.

c. Testimony of Larry Ross, Trooper,

Tennessee Highway Patrol.

Trooper Larry Ross and Agent Wayne Kildee were parked approximately one-half mile from the house under surveillance. They had radio contact with the surveillance team and also had radio contact with other Sheriff's Department units. Ross' directions were to follow and identify vehicles leaving the target area by tag or by the occupants of the vehicles. Ross testified that he did not know William Sanders prior to March 9, 1990.

When Sanders left his home the evening of March 9th, Trooper Ross followed Sanders' vehicle, travelling approximately three or four hundred yards behind Sanders He testified that Sanders was driving in an erratic manner, slamming on the brakes of his vehicle and slowing down. Ross stated that the vehicle ran off the right side of the road several times and crossed the cen-

ter line several times. Ross radioed the County unit carrying Vastbinder and Sadler that he needed to make a traffic stop. Before Vastbinder and Sadler caught up with him, Sanders' vehicle turned left, headed west onto the 45 Bypass.

Trooper Ross pulled off to the side of the road and stopped approximately a quarter of a mile behind Vastbinder. Vastbinder and Sadler radioed Ross after a minute or two that the individual was armed and they had placed him under arrest.

Ross requested Vastbinder's help because Ross drove a van. Although the van had a blue light, he anticipated difficulty identifying himself and his companion as police officers. Vastbinder was in a plain car.

On cross-examination, Trooper Ross testified that the various law enforcement officials had a meeting prior to the sur-

veillance. They placed Sanders' home under surveillance because Sanders had been with the Hell's Angels. Ross testified that everyone in the group knew of Sanders' affiliation with the Hell's Angels.

Ross could not recall if he and Agent Kildee approached close enough to Sanders' vehicle to obtain the tag number. Other traffic on the road prevented him from obtaining that information. Ross testified that Sanders travelled at least five or six hundred yards ahead of his vehicle, and at least the length of two football fields separated them. There was traffic between Ross' vehicle and Sanders' vehicle. Ross did know the grade of the road. He conjectured that it was fairly level at that area. He had travelled three, four or five miles on 45 before he called Vastbinder.

Ross could not testify how fast Sanders' vehicle was traveling. Ross did not know whether Sanders' lights were bright or dim. Sanders did not run anyone off the road or hit anyone. To Ross' knowledge, Sanders did not exceed the speed limit. Ross stated that Sanders left the paved portion of the highway and Sanders' vehicle ran off the right side of the road. Ross did not charge Sanders with any traffic offense.

Ross actually wrote the Search Warrant although its composition was a joint effort. Sadler told Ross that, upon approaching the vehicle, he observed a revolver in the holster on the front seat next to Sanders.

Ross and Vastbinder approached Judge Hayes at his residence the evening of March 9th around midnight to obtain a Search Warrant for Sanders' residence.

d. Testimony of Nickie Sadler, Deputy Sheriff, Obion County Sheriff's Department.

Deputy Nickie Sadler was positioned on the west side of Sanders' house on March 9, 1990.

When Sadler received the call from Ross, he proceeded to 45 Highway to assist. According to Sadler, Ross was in a vehicle with no emergency lights and no way to stop Sanders' vehicle.

Approximately a mile before Sanders reached the City Limits of South Fulton, Kentucky, Sadler came in visual contact with Sanders' vehicle. Sanders turned off 45 onto the 45 Bypass. Sadler allegedly could see Sanders' vehicle travelling down a long grade, taillights coming on and going off, with the truck leaving the righthand side of the road. Several cars separated Sadler's vehicle from Sanders' truck.

After Sadler stopped Sanders' vehicle, Sadler approached the driver's side, asked for the gentleman's identification, and told Sanders why he was stopping him. Sadler then asked Sanders to step from his truck to the back of the truck, where Vastbinder was standing. Sadler testified that Sanders produced his identification after he stepped to the back of the truck. Sadler handed the driver's license to Vastbinder. Sadler testified that he stopped the vehicle because he thought the driver was driving under the influence. When Sanders exited his truck, Sadler looked into the front seat of the truck and saw a weapon, laying on the truck seat.

The gun was in a holster partially hidden, positioned next to where Sanders had been sitting. Sadler advised Vastbinder of the weapon. Vastbinder placed Sanders under

arrest. Sanders was handcuffed, searched and placed in the patrol car.

Sadler first testified that he did not have any briefing prior to the surveillance. He then testified that he was briefed on what he was doing and that the various law enforcement officers were there for surveillance and for gathering information on a suspected person. Sadler identified the suspected person as Sanders. Sadler did not know where Sanders lived but the information was made available to him at the briefing. Sadler was there to gather information about drugs or vehicles coming and going.

Sadler could not tell how fast Sanders was driving. Sadler could only see the vehicle in front of Sanders and Sanders' brake lights coming on and going off. Sadler did not know if Sanders' headlights were on dim or bright or how close he was to the

vehicle in front of him. Sadler saw Sanders leaving his lane about three times. Sadler did not see Sanders cross over the center line. Sadler did not see Sanders leave the pavement when he crossed the fog line on the right hand side of the road. When Sadler and Vastbinder pulled behind Sanders and turned on the blue lights, Sanders promptly pulled to the right side of the road. The law enforcement officers stopped about two car lengths behind Sanders' pickup truck. Sadler told Sanders that his driving was erratic and asked to see his driver's license. Sadler asked Sanders what his problem was. Sanders replied that he didn't have a problem. He asked Sanders if he had had anything to drink. Sadler believed that Sanders stated that he may have had a beer earlier that afternoon. Sadler did not smell any alcohol on Sanders. Sadler told Sanders to step to the rear of the

vehicle where the other officer was standing. As Sanders walked to Vastbinder, Sadler did not note any indication that Sanders was intoxicated. Sadler did not charge Sanders with intoxication. Sanders was not charged with any traffic offense.

Sadler then stepped to the open door of the truck. Sadler allegedly saw the weapon laying in the seat of the truck. He did not see a revolver on the front seat next to Sanders when Sanders occupied the truck.

Sadler handcuffed Sanders. He took Sanders to the patrol car and placed him in the back seat. Sadler then continued to search the truck, finding a plastic bag with a white powdery substance in the front pocket of Sanders' shirt lying on the floor. He found some green leafy material believed to be marijuana in a brown zip up bag and a cigarette case containing a

marijuana cigarette. No one helped Sadler with the search. Ross and Kildee arrived after Sadler had handcuffed Sanders.

e. Testimony of William Sanders.

William Sanders testified on his own behalf. He lived at Route 2, Box 105, South Fulton, Tennessee, in a home he inherited from his grandfather. At his attorney's request, he drove a vehicle accompanied by a passenger operating a video camera. They taped the area from his home to the place where he was arrested on March 9, 1990.

From his driveway to 45 Highway is seven-tenths of a mile. The video tape showed the turn North onto 45 going toward South Fulton. The highway is a two lane highway with fog lines and a white center line with a broken yellow line indicating where a vehicle can pass and where it can not pass. The speed limit is

fifty-five (55) miles per hour on Highway 45 but, as the City Limits of South Fulton approach, there is a forty-five (45) miles per hour zone.

Sanders testified that he intended to exit onto Highway 51. He indicated the place where he was stopped. He was a couple of hundred yards, if that far, from the Kentucky state line.

He testified that he did not violate the speed laws. He did not weave in and out of traffic, nor did he weave over the center or side lines. He testified that he did not violate any driving rules nor was he under the influence of any intoxicant.

ARGUMENT

According to Rule 10 of the Rules of the United States Supreme Court, the following list indicates the character of reasons that will be considered in granting a review on certiorari:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court,

> or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Petitioner, William D. Sanders, respectfully insists that the case before this Court satisfies the requirements of subsections (a) and (c) of Rule 10.

For the following reasons, the Petitioner further submits that the District Court and the Court of Appeals erred.

A.

THERE WAS NOT PROBABLE CAUSE FOR THE STOPPING OF SANDERS' VEHICLE

Law enforcement officers may conduct a warrantless search of an automobile if there exists probable cause to believe that the vehicle contains contraband. United States v. Ross, 456 U.S. 798, 808 (1982). The probable cause element is tested according to the same standard as if officers were seeking a warrant. That is, "the probable-cause determination must

be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers." Id. at 808. The stopping of an automobile and detaining its occupant constitutes a seizure within the meaning of the Fourth and Fourteenth Amendments, even though the purpose of the stop is limited and the resulting detention is brief. Delaware v. Prouse, 440 U.S. 648, 653 (1979).

In the case before this Court, Defendant Sanders contends that his operation of his motor vehicle was at all times reasonable and prudent and that all vehicular movements were made safely and with due regard for speed and traffic conditions. At the suppression hearing, Sanders denied violating any driving rules or driving under the influence.

Assuming for the sake of argument only that the law enforcement officials observed Sanders weaving in his lane and tailgating the vehicle in front of him, the Defendant submits that Lt. Vastbinder and Deputy Sadler would not have stopped Sanders' vehicle but for their desire to search the vehicle. "[T]he proper inquiry is whether a reasonable officer would have made the seizure in the absence of illegitimate motivation." United States v. Smith, 799 F.2d 704, 708 (11th Cir. 1986) (emphasis in original).

Absent probable cause upon which to base the conduct of Ross, Vastbinder and Sadler, the Government must demonstrate either voluntary consent by the Defendant or an objective factual basis for an investigatory stop. The search of Sanders' vehicle was not made by voluntary consent of the Defendant. Therefore, the Defen-

dant challenges the basis for the initial stop by Vastbinder as lacking in an objective factual basis.

Although law enforcement officers may, even without probable cause under certain circumstances, be warranted in briefly stopping individuals for limited purposes, such an investigative stop requires specific and articulable facts which taken together with rational inferences from those facts reasonably warrant a belief that the safety of the officer or of others is in danger. Terry v. Ohio, 392 U.S. 1, 21 (1968). In Delaware v. Prouse, 440 U.S. 648 (1979), the Supreme Court determined that a police officer who stopped the defendant without observing any traffic or vehicle equipment violation or any suspicious activity but who made the stop only to check the driver's license and

registration of the vehicle violated both the Fourth and Fourteenth Amendments. Further, in United States v. Brignoni-Ponce, 422 U.S. 873 (1975), the Supreme Court found that officers of the Border Patrol may stop a vehicle only if they are aware of specific, articulable facts together with rational inferences from those facts which reasonably warrant suspicion that the vehicle contains aliens who may be illegally in the country. The Court stated that each case turns on the totality of the particular circumstances and listed specific potential factors for consideration. Id. at 884-885.

In a case involving another border search, the Supreme Court identified two elements of the particularized suspicion necessary for the justification of an investigatory stop: (1) "the assessment must be based upon all the circumstances";

(2) the assessment "must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." United States v. Cortez, 449 U.S. 411, 418 (1981), rehearing denied, 455 U.S. 1008 (1982). An examination of the observations of Ross, Vastbinder and Sadler tested fairly and reasonably provides no basis for believing that Sanders was engaged in wrongdoing. Sanders operated his vehicle within the speed limit. At no time did his vehicle pose a traffic or safety hazard. There was no basis upon which to justify a stop in the case before this Court.

In the case before this Court, Ross, Vastbinder and Sadler alleged that Sanders was weaving in his lane and tailgating the car in front of him. Ross, however, testified that at least two football fields separated his vehicle from Sanders' vehicle. In addition, traffic separated

the vehicles. Not only did traffic separate Vastbinder's and Sadler's vehicle from Sanders' vehicle but the van carrying Ross and Kildee also separated Vastbinder and Sadler from Sanders.

Vastbinder did not observe Sanders cross the center line. He could not recall the type of vehicle in front of Sanders or how close Sanders drove to the vehicle. Sadler could not recall this information either. Ross could not estimate the speed of Sanders' vehicle. Ross stated that Sanders crossed the right hand side of the road; however, Sadler did not observe Sanders leave the pavement when he crossed the fog line on the right hand side of the road. Sanders did not strike the vehicle in front of him. The vehicle did not speed up to get out of Sanders' way. There was no flashing of lights between the two vehicles. No one test-

ified that Sanders attempted to pass the vehicle in front of him.

After the stop, Sanders presented a valid driver's license. Sadler detected no alcoholic smell on Sanders. Sanders did not behave suspiciously nor did he offer any threat. None of the officers involved performed a field sobriety test on Sanders. He was not given a ticket for crossing lanes, speeding, tailgating, following too closely or any other traffic offense. Moreover, the incident took place at night on a dark and rural highway when traffic was heavy.

If a vehicle operated within the speed limit and in a safe fashion can be stopped for weaving across the right fog line, then every automobile in traffic is subject to stop at any time. If weaving a couple or even a few times across the fog line is sufficient without more to justify

a stop, then a number of innocent travelers are subject to stop by the police. As the Supreme Court of Florida observed in Collins v. State, 65 So.2d 61, 61 (Fla. 1953):

> "A holding that such a feeble reason (driving over the center line of a highway three times within a mile) would justify a halting and searching would mean that all travelers on the highway would hazard such treatment, for who among them would not be guilty of crossing the center so much as a foot from time to time. All could, therefore, be subjected to inconvenience, ignominy, and embarrassment on the excuse that an occasional incident might yield some contraband or another."

In the case before this Court, the officers did not possess an articulable basis for suspecting criminal behavior on Sanders' part or possession of contraband. They had no reason to fear for their own safety. While they knew that Sanders was a member of the Hell's Angels Motorcycle Club, this knowledge did not constitute

probable cause to stop and search him. In the case before this Court, the warrantless search of Sanders' vehicle was conducted for the purpose of discovering evidence and was, therefore, per se, unreasonable.

B.

THE STATED REASON FOR THE TRAFFIC STOP WAS, IN FACT, A PRETEXT FOR AN UNAUTHORIZED SEARCH AND SEIZURE

Even if this Honorable Court finds that Vastbinder could reasonably have stopped the Defendant's pickup consistent with Fourth Amendment requirements, Defendant submits that a reasonable officer would not have made the stop in the absence of an illegitimate motivation, that is, the hope without a reasonably sufficient factual basis of catching a drug dealer or courier.

> "A pretextual stop occurs when the police use legal justi-

fication to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop. The classic example, presented in this case, occurs when an officer stops a driver for a minor traffic violation in order to investigate a hunch that the driver is engaged in illegal drug activity."

". . . an objective test that asks no more than whether some set of facts might justify a given stop would permit arbitrary instrusions in situations such as a traffic stop. Under such a test, thousands of everyday citizens who violate minor traffic regulations would be subject to unfettered police discretion as to whom to stop. To paraphrase one commentator, in the absence of standardized police procedures that limit discretion, whether we are simply allowed to continue on our way with a stern look, or instead are stopped and subjected to lengthy and intrusive interrogation when we forgot to wear our seat belts, turns on no more than 'the state of the digestion of any officer who stops us or, more likely, upon our obsequiousness, the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin." United States v. Guzman, 864

F.2d 1512, 1515, 1516 (10th Cir. 1988).

This kind of arbitrary conduct is unreasonable under the Fourth Amendment. The Supreme Court has previously forbidden certain police practices which are not amenable to objective review based upon the need to restrain this arbitrary exercise of discretionary police power. In Brown v. Texas, 443 U.S. 47, 52 (1979, the Supreme Court stated:

> "[W]hen . . . a stop is not based upon objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits."

In Delaware v. Prouse, 440 U.S. 648, 661 (1979), the Supreme Court stated:

> "[S]tandardless and unrestrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed."

The leading pretextual stop case is United States v. Smith, 799 F.2d 704 (11th

Cir. 1986). In that case, the suspect was pulled over after weaving a total of three times, at least one of which was across the white painted edge line of the interstate. Applying an objective test considering the circumstances, the Eleventh Circuit found that a reasonable officer would not have stopped the suspect's vehicle for a traffic investigatory purpose absent an additional and invalid purpose.

In the case before this Court, the Defendant respectfully submits that the law enforcement officers stopped him on a pretext. According to Agent McIntyre, he planned at least a two week surveillance of Sanders' home. Law enforcement officials were to identify as many people coming and going as possible. A man and woman came to the house and stayed ten to fifteen minutes. Yet, the law enforcement officers did not follow and identify them. Two men

with a large dog came to the home and stayed twenty minutes. They exited with beer bottles in their hands and urinated in the front yard. Yet, the law enforcement officers did not follow and identify them.

The various law enforcement officers' testimony as to Sanders' identity prior to the surveillance was conflicting. Agent McIntyre testified that he did not know Sanders' identity prior to the surveillance. He only knew that a member of the Hell's Angels occupied the home. The law enforcement officers agreed that there was a meeting before the surveillance. Trooper Ross testified that he knew Sanders was a Hell's Angel and so did the other law enforcement officials attending the meeting. Ross knew that Sanders lived in the house under surveillance and drove a red pickup truck. At first, Sadler testified that there was no briefing prior to the

surveillance. He then said that there was a meeting and that the purpose of the surveillance was to gather information on a suspected person Sanders. Sanders and Vastbinder had met several years earlier when Vastbinder worked at a Harley Davidson store.

Trooper Ross testified that Sanders was driving erratically; however, he made no attempt to stop him but rather called Vastbinder and Sadler to stop him. Sadler testified that Ross' van had no emergency lights and, therefore, could not stop Sanders; however, Ross, in prior testimony, testified that the van had a blue light. Sanders was stopped a couple of hundred yards, if that far, from the Kentucky State Line.

The video tape of the route taken by Sanders did not match the descriptions given by Vastbinder, Ross and Sadler.

Although Vastbinder and Sadler allegedly stopped Sanders because of the way he was driving, he was not ticketed for a traffic offense. He produced a valid driver's license. He had no alcoholic smell and was not given a field sobriety test.

Only after Sadler ordered Sanders from the truck did he see a pistol.

The following decisions are analogous to the present case. In United States v. Miller, 821 F.2d 546 (11th Cir. 1987), the defendant allowed his right wheels to cross over the white line painted marker about four inches in violation of Florida traffic laws. The Court held that the stop was pretextual and that it was made because of an apparent hope to catch a drug courier and not because of traffic violations. In State v. Blair, 691 S.W.2d 259 (Mo. 1985), the arrest of the defen-

dant for parking violations was held to be a subterfuge or pretext to gather evidence of the unrelated crime of homicide. In Collins v. State, 65 So.2d 61 (Fla. 1953), the Court held that driving over the center line of the highway on three occasions within a mile was not a violation of Florida law and hence did not justify a stop and search.

The Defendant submits that the facts and circumstances of this case strongly suggest that the alleged traffic violations observed by the officers were, in fact, merely a pretext to stop Sanders' vehicle.

Because there was no probable cause to stop Sanders' vehicle and the stop was merely a pretext to search his vehicle for evidence of illegal activities, the Defendant respectfully submits that all evi-

dence found during the search should have been suppressed.

C.

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT APPLICATION DOES NOT ESTABLISH SUFFICIENT PROBABLE CAUSE

In addition to suppression of any evidence gathered in the search of the vehicle, the Defendant seeks the suppression of any and all evidence obtained as a result of the March 10, 1990 search of his Obion County home. Defendant Sanders bases this argument on the fact that the Affidavit in support of the search warrant application is fatally lacking in sufficient indicia of probable cause.

The first paragraph of the Affidavit in support of the search warrant is set out in its entirety as follows:

"On 3/9/90, law enforcement officers began a surveillance on the residence of William Sanders located at Route 2, Box 105, Wolf Creek Rd., McConnell Community, Obion County, Tenn. William Sanders is known to law enforcement officers to be a member of the Hell's Angels motorcycle club, Kentucky Chapter. Lt. Jerry Vastbinder received information within the past two months that a Sanders' resident on Wolf Creek Road in the McConnell Community was dealing in narcotics and stolen property. Lt. Vastbinder further has conducted drive by surveillances of the residence of Sander and recorded several vehicle registrations of the vehicles parked at the residence. Upon checking the registrations of the vehicles, Lt. Vastbinder determined that several of the registered owners were reported to be involved in drug trafficking in the Obion County area."

At the hearing, Agent McIntyre testified that he had received surveillance information that the Sanders' residence may have been involved in drug trafficking. The Magistrate repeatedly prevented the defense from delving into the information which prompted McIntyre's investigation.

The Magistrate stated that he would not consider any information available to McIntyre before he set up surveillance as a basis for probable cause. He stated that the presence of vehicles at the Sanders' residence would not be considered a basis for probable cause. The Court would not allow the defense to question Lt. Vastbinder as to tags he had observed on cars at the Sanders' residence in his drive-by surveillance prior to the March 9, 1990 surveillance. Despite these rulings, the Magistrate's Proposed Findings of Fact, Proposed Conclusions of Law, and Recommended Disposition contained the following language, at Paragraph 18:

> "18. The Affidavit for this search warrant outlined the above mentioned surveillance. It also stated the following: 'Lt. Vastbinder further has conducted drive-by surveillances (sic) of the residence of Sanders and recorded several vehicle registrations of the vehicles parked at the residence.

> Upon checking the registrations of the vehicles, Lt. Vastbinder determined that several of the registered owners were reported to be involved in drug trafficking in the Obion County area."

Paragraph 30 of the Proposed Findings of Fact, Proposed Conclusions of Law and Recommended Disposition states as follows:

> "The Affidavit submitted with this search warrant request indicated that there were several vehicles seen at the defendant's address from time to time, some registered to persons reportedly involved in drug trafficking in Obion County. The Affidavit further indicated that the defendant had drugs on his person when arrested, and also had books which, to an experienced law enforcement officer, indicated that defendant was trafficking heavily in drugs. It is submitted that an issuing Magistrate could justifiably deduce from these facts that there was probable cause that the defendant was keeping drugs at his home, and could thus issue a search warrant for the defendant's home."

The Magistrate ruled that counsel for the Defendant was prevented from examining the officers concerning the registration

of vehicles seen at the Defendant's address. Although there was no Franks v. Delaware, 438 U.S. 154 (1978), claim made at the time of the suppression hearing, such a claim was subsequently made. The Magistrate stated that the evidence of traffic was not considered in the Proposed Findings of Fact regarding the search of the vehicle. Apparently, however, the Magistrate considered this information in testing the validity of the Search Warrant.

Even though he ruled that he would not consider the vehicle registrations and prevented the defense from following this line of questioning, the Magistrate still considered this information.

The first paragraph of the Affidavit reveals no facts which permit a judicial officer making the probable cause determination to reach a judgment as to whether

the source of this information had any credible basis for the allegation that Sanders had been or would be involved in criminal conduct or that evidence of a crime would be found at his residence. All that is referred to is an unknown number of drive-by surveillances at unidentified times which yielded an unknown number of vehicle registrations of which Lt. Vastbinder determined that several were reported by some unidentified source as being involved in drug trafficking in some unidentified fashion. The Supreme Court in Illinois v. Gates, 462 U.S. 213, rehearing denied, 463 U.S. 1237 (1983), adopted a totality of the circumstances approach; however, questions of veracity and basis of knowledge remain relevant in determining probable cause.

What little factual information is contained in the first paragraph of the Affidavit in support of the search warrant

is stale. Lt. Vastbinder stated that he had "received information within the past two months that a Sanders' resident . . . was dealing in narcotics and stolen property." In regard to the staleness issue, the Supreme Court has stated:

> "While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the proof must be a fact so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case." Sgro v. United States, 287 U.S. 206 (1932).

In the Affidavit before this Court, there is no factual information documenting a history of drug dealing over a significant time frame. There are no facts supporting the conclusion that Sanders possessed a quantity of drugs. There are no facts supporting an allegation of one sale of drugs much less ongoing criminal

activity or repeated sales of drugs. In the case before this Court, law enforcement authorities did not take the additional time to corroborate the allegations contained in the Affidavit of Complaint. To sustain a determination of probable cause, this Court would have to hold that a search warrant may be issued on the basis of mere suspicion of criminal conduct. Moreover, none of the information contained in the Affidavit refers to the location of contraband. While the Affiant concluded that contraband was at Sanders' residence, an Affidavit must set forth how the information leading to such a conclusion was obtained. The Affidavit provides no indication of where any alleged transactions took place, who they were with, or long they took. The Affidavit provides no information regarding corroborative evidence that Sanders kept drugs in his home.

Absent some additional corroboration, the discovery of contraband on a person or in his vehicle does not implicate an individual's home. Probable cause to believe a man has committed a crime does not necessarily give rise to probable cause to search his home.

D.

THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY TO THE SEARCH OF SANDERS' RESIDENCE

In the case of United States v. Leon, 468 U.S. 897, rehearing denied, 468 U.S. 1250 (1984), the Supreme Court adopted a partial good faith exception to the exclusionary rule. Specifically, the Court held that the exclusionary rule should be modified so as to not bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant later

found to be unsupported by a probable cause.

To satisfy this standard, the officer must have "objectively reasonable grounds" for believing that the warrant was properly issued. In analyzing the good faith exception, the Court identified four situations in which a search pursuant to a warrant may be held to be illegal.

First, under Franks v. Delaware, 438 U.S. 154 (1978), a warrant which is sufficient on its face is invalid if based upon knowingly or recklessly made falsehoods in the Affidavit. Second, where the issuing Magistrate wholly abandoned his judicial role a resulting search remains outside the Leon exception. Id. at 923. This may occur when a Magistrate acts as mere rubber stamp for the police or as an adjunct law enforcement officer. Id. at 914. Third, an officer would not manifest an

objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render belief in its existence unreasonable. Finally, depending upon the circumstances, a warrant may be so facially deficient, that is, fail to particularize the place to be searched or the things to be seized, that the executing officers can not presume it to be valid.

In the case before this Court, there is no basis for the application of the good faith exception to the exclusionary rule. Deputy Sadler's testimony at the suppression hearing concerning when he observed the gun in Sanders' truck differed from the statement made in the Affidavit. The Defendant respectfully submits that the evidence seized as a result of the search warrant should be suppressed.

I. CONCLUSION

For the foregoing reasons, Defendant, William D. Sanders, respectfully requests this Court to grant his Petition in this cause for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to hear and decide his case on oral argument and Briefs.

RESPECTFULLY SUBMITTED this 7 day of January, 1992.

JAMES D. CAUSEY,
Attorney for Defendant
230 Adams Avenue
Memphis, Tennessee 38103
(901) 526-0206

J. CERTIFICATE OF SERVICE

I, James D. Causey, Attorney for Defendant, William D. Sanders, hereby certify that I have this 1 day of January, 1992, pursuant to Rule 28 of the Supreme Court Rules, caused to be served upon The Honorable Ed Bryant, United States Attorney, Federal Building, Memphis, Tennessee 38103, Mr. Joseph C. Murphy, Jr., Assistant United States Attorney, Federal Building, Memphis, Tennessee 38103, and the Solicitor General, Department of Justice, Washington, D. C. 20530, copies of the foregoing Petition for Writ of Certiorari filed by William D. Sanders, by placing copies of the same in the United States Mail, properly addressed, and with sufficient postage affixed thereto.

James D. Causey

91-1223

NO.

Supreme Court, U.S.
FILED
JAN 8 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1992

WILLIAM D. SANDERS,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JAMES D. CAUSEY, Counsel of Record
230 Adams Avenue
Memphis, Tennessee 38103
(901) 526-0206

Attorney for Petitioner,
William D. Sanders

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NOT RECOMMENDED FOR PUBLICATION

No. 91-5267

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
	)	ON APPEAL FROM THE
Plaintiff/ Appellee	)	UNITED STATES
	)	DISTRICT COURT FOR
	)	THE WESTERN DISTRICT
v.	)	OF TENNESSEE.
	)	
WILLIAM D. SANDERS,	)	
	)	
Defendant/ Appellant	)	

Decided and Filed _____

BEFORE: RYAN and NORRIS, Circuit Judges; DUGGAN, District Judge*

PER CURIAM. Defendant, William D. Sanders, appeals the district court's denial of his motion to suppress evidence. He entered a conditional plea

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*The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

of guilty, reserving the right to appeal the denial of this motion to suppress.

Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of the parties, we are unable to say that the district court erred in refusing to suppress the evidence.

As the reasons why the motion to suppress should be denied have been articulated by the district court, the issuance of a written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the ruling of the district court and its judgments of conviction and sentence are affirmed upon the reasoning set out in the magistrate's proposed findings of fact, proposed conclusions of law, and recommended disposition of September 13, 1990.

ISSUED AS MANDATE: 11/5/91

COST: No Cost

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	NO.
	)	
vs.	)	90-20074-GA
	)	
WILLIAM D. SANDERS,	)	
	)	
Defendant.	)	

PROPOSED FINDINGS OF FACT, PROPOSED CONCLUSIONS OF LAW, AND RECOMMENDED DISPOSITION

Defendant herein William D. Sanders, has filed a motion seeking an order suppressing all evidence obtained as a result of his supposedly unlawful arrest, and the subsequent search, on or about March 9, 1990, in Obion County, Tennessee. This motion was referred to the United States Magistrate for hearing and for recommended disposition. An evidentiary hearing was set on numerous occasions, but was finally held on August 29, 1990.

PROPOSED FINDINGS OF FACT

1. Some time after noon on Friday, March 9, 1990, Bart McEntire, a special agent for the United States Alcohol, Tobacco, and Firearms agency, went to a rural area in Obion County, Tennessee (just outside South Fulton, Tennessee, and very near the Tennessee-Kentucky line), which is in the Western District of Tennessee. Agent McEntire wished to set up surveillance of a resident on Wolf Creek Road, in Obion County, Tennessee.

2. Although Agent McEntire testified that at the time of this surveillance, he did not know who owned this residence, it seems clear from the proof that he either knew the occupant's name or at least knew that the occupant was a member of the Hell's Angels motorcycle club. The occupant was in fact defendant William D. Sanders. The residence was listed in the name of Sanders' deceased grandfather, and

had been willed to Sanders.

3. Prior to setting up surveillance on Sanders' residence, Agent McEntire went to the Obion County Sheriff's office, and recruited some County law enforcement agents to assist him in this surveillance. A Tennessee Highway Patrol officer also assisted.

4. The purpose of this surveillance was to observe activities at this residence, including people and vehicles. These vehicles were to be identified by license numbers (and their ownership checked), and the people who visited were to be identified (and, in many cases, followed). Agent McEntire suspected that residents of this home on Wolf Creek Road were engaged in drug trafficking. Agent McEntire placed himself and the Obion County law enforcement agents helping him in strategic and concealed positions.

Agent McEntire instructed his helpers to stay out of sight, but to obtain tag numbers, direction of travel, etc., of any vehicles. These officers were instructed not to stop any vehicles unless the officers actually saw a violation of the law, and then to make the stops far away from Sanders' house so as to avoid exposing this surveillance. Agent McEntire testified that he fully expected this surveillance to last at least two (2) weeks.

5. At about 5:30-5:45 P.M., on March 9, 1990, Agent McEntire saw a blue pickup truck arrive at the Sanders address, carrying a male driver and a female passenger. These stayed for about fifteen (15) minutes. One of the State officers tried to follow this pickup, but was unsuccessful. Then, at about 7:30-7:45 P.M., a second pickup truck arrived, carrying two (2) males and a dog. These men stayed for about twenty (20) minutes

then came out, carrying beer bottles. Witnesses testified that these two (2) individuals stopped and urinated in the Sanders front yard, in full view of the road; they then got into their truck and drove off.

6. Agent McEntire later, at about 8:30 P.M., saw defendant William Sanders come out of the house, enter a red pickup truck, and drive off. McEntire radioed Larry Ross, a Tennessee Highway Patrolman (who was also assisting in this surveillance), asking him to follow Sanders. Ross was driving a van, with a rookie special agent for ATF riding with him. Ross also had a "drug-sniffing" dog with him.

7. The proof showed that defendant William Sanders, who proceeded east on Wolf Creek Road and then north on U.S. Highway 45, was headed toward the Hells Angels club house, just across the State

line in Kentucky.

8. Ross followed defendant William Sanders on Wolf Creek Road, and noticed that Sanders was driving erratically. More specifically, Sanders' vehicle would from time to time veer off onto the side of the road, across the curb white line,[1] then coming back into its proper driving position. Further, Ross noticed that Sanders' vehicle would from

9. Ross concluded that Sanders' driving was a danger to others, and that from time to time speed up, getting very close to the vehicle in front of it. Sanders would on these occasions be required to apply his brakes, causing his brake lights to come on. Ross saw Sanders drive in this fashion on Wolf Creek Road, and also on Highway 45.

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[1] This line was referred to by counsel for defendant as the "fog line", and seems an appropriate designation.

Sanders might very well be intoxicated. Cognizant, however, of McEntire's earlier instructions, Ross waited until Sanders had left the area under surveillance. Further, Ross felt that his vehicle (a van) was not an appropriate vehicle to be used, if Sanders were to be arrested for driving under the influence of an intoxicant, since there might be some difficulty in transporting Sanders to a nearby jail.

10. Ross therefore radioed Jerry Vastbinder, a criminal investigator for the Obion County Sheriff's office (who was also involved in this surveillance operation). Ross knew that Vastbinder had a more appropriate vehicle, and had an Obion County Deputy Sheriff (Deputy Nickie Sadler) riding with him. Ross advised Vastbinder that the driver of the red pickup truck ahead of him appeared to be driving under the influence of an intoxicant and

requested that he stop this vehicle.

11. Vastbinder caught up with Ross and positioned himself so he could see Sanders' red pickup truck. Vastbinder also noticed that the pickup truck was veering over across the "fog line" and "tailgating". Vastbinder thereupon passed Ross, caught up with Sanders, and pulled his vehicle over.

12. Sanders stopped his vehicle, about ten (10) to fifteen (15) feet ahead of Vastbinder's vehicle. Vastbinder stayed with his vehicle while Deputy Nickie Sadler went up to Sanders' vehicle. Sadler requested Sanders to get out of his vehicle and to walk back to Vastbinder. This was for the purpose of observing Sanders to see whether his walk was unsteady, indicating intoxication.

13. Sadler had directed Sanders to provide Vastbinder with his driver's license. When Sanders left his truck to

walk back to Vastbinder, he left the left or driver's door open. Sadler remained near the truck. Sadler looked into the open door of the pickup truck, and saw a pistol protruding from a holster, in the middle of the seat of this pickup truck. He also observed, in the middle of the floorboard, a green overnight kit and a shirt.

14. Sadler called back to Vastbinder and said that Sanders had a gun on the seat of his truck. Vastbinder then pulled his weapon and placed Sanders under arrest for the State charge of carrying a pistol. Handcuffs were placed on Sanders, and he was placed in the back seat of Vastbinder's vehicle. Sadler removed the pistol and determined that it was loaded. Sadler searched the green overnight kit and found it to contain marijuana. Also found in the shirt was a plastic bag containing a white substance, field tested as

being cocaine. Sanders had in his possession $706.00 in cash. Also found were books with numbers written in them.

15. It was later developed that Sanders had not been drinking alcohol. No tests were made regarding whether Sanders had recently smoked marijuana or had sniffed or "shot up" cocaine.

16. Trooper Ross came up soon after this arrest. Vastbinder, Ross, McEntire, and possibly another officer went to the Obion County Sheriff's office and, after placing Sanders in jail, prepared an affidavit and a proposed warrant for the search of the Wolf Creek Road residence of Sanders. A State Judge of appropriate jurisdiction was called and, at approximately midnight, these officers went to the Judge's home. The Judge, after reading the affidavit and requiring certain corrections, issued the search warrant.

17. These officers, armed with this

search warrant, went to the Wolf Creek Road residence, searched it and found approximately 90 grams of methamphetamine[2] in Sanders' bedroom along with two pistols and approximately $1,200.00 in cash.

18. The affidavit for this search warrant outlined the above-mentioned surveillance. It also stated the following:

> "Lt. Vastbinder further has conducted drive-by surveillances (sic) of the residence of Sanders and recorded several vehicle registrations of the vehicles parked at the residence. Upon checking the registrations of the vehicles, Lt. Vastbinder determined that several of the registered owners were reported to be involved in drug trafficking in the Obion County area."

19. The affidavit also stated:

> "A further search of the vehicle (Sanders' vehicle, at the time of his arrest) produced a small quantity of marijuana and drug paraphernalia. In addition, several books were found, one of which contains numerous numerical amounts

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[2] Originally incorrectly identified as cocaine.

being added and subtracted. Your affiant knows the numerical amounts are consistent with amounts normally charged by drug dealers for an ounce of cocaine or methamphetamine. The total amounts of these additions and subtractions total over $23,000.00".

PROPOSED CONCLUSIONS OF LAW

20. Defendant has argued that his motion to suppress should be granted because (1) the stop of his vehicle was without justification, and/or was pretextual; (2) the subsequent search of his vehicle was unlawful; (3) the affidavit to the search warrant was inadequate as a matter of law to justify the issuance of a search warrant; and (4), if the search warrant was invalid, no reasonably well-trained officer could have relied upon its validity.

21. It is submitted that the testi-

mony of the officers justifies the proposed finding of fact made herein that their decision to stop defendant was made because he appeared to be driving under the influence of an intoxicant and was thus a danger to others. That being so, it is submitted, there is no need to determine whether the pretextual use by an officer of minor traffic offenses to stop a vehicle (where a "reasonable officer" might not have done so under different circumstances) justifies a court in concluding that the stop was invalid. See, e.g., U.S. v. Smith, 799 F.2d 704, 708 (11th Cir. 1986); U.S. v. Miller, 821 F.2d 546, 549 (11th Cir. 1987).

22. Motor vehicles may be stopped by law enforcement officers, under Terry v. Ohio, 392 U.S. 1 (1968), where, under the totality of the circumstances, the officers have a particularized and objective basis for suspecting the driver of crimi-

nal activity. U.S. v. Cortez, 449 U.S. 411, 417-418 (1981); Delaware v. Prouse, 440 U.S. 648, 663 (1979).

23. It is submitted that these officers saw defendant, from time to time, veer off onto the side of the road, then back onto the driving lane, and saw the defendant speed up, get too close to traffic ahead, thereafter having to apply his brakes. This persistent conduct provided, it is submitted, a "particularized" and "objective" basis for suspecting that defendant was driving his pickup truck while under the influence of an intoxicant. The stop, therefore, it is submitted, was justified. U.S. v. Pino, 855 F.2d 357, 361 (6th Cir. 1988), modified 866 F.2d 147 (6th Cir. 1989), cert. denied, ___ U.S. ____, 110 S.Ct. 1160 (1990).

24. Since this investigative stop was, as previously submitted, lawful, it was reasonable for these officers to re-

quire defendant to step outside his vehicle. Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977).

25. Further, since this investigative stop was, as previously submitted, lawful, it was permissible for the stopping officer to search the passenger compartment of the truck, in those areas where a weapon might be placed or hidden. The fact that defendant was outside the pickup truck when this search was conducted is irrelevant. Michigan v. Long, 463 U.S. 1032, 1049, 1052 (1983).

26. It is therefore submitted that the discovery by Deputy Sadler of the pistol in defendant's pickup was consistent with the Fourth and Fourteenth Amendments of the United States Constitution.

27. The possession of this loaded pistol was a violation of State law, and justified these officers in making a custodial arrest of defendant. Where there

has been a lawful custodial arrest of the occupant of a motor vehicle, officers may, as a contemporaneous incident of that arrest, search the entire passenger compartment of that vehicle. New York v. Belton, 453 U.S. 454, 460 (1981).

28. It is therefore submitted that the marijuana and other controlled substances, as well as the books with numbers contained therein, were properly seized incident to this arrest.

29. Since these drugs (and the books) were, as previously indicated, lawfully seized, it is submitted that they could have, and should have, been included as a part of the affidavit submitted to the State Judge in attempting to convince him to issue the search warrant for defendant's home.

30. The affidavit submitted with this search warrant request indicated that there were several vehicles seen at defen-

dant's address from time to time, some registered to persons reportedly involved in drug trafficking in Obion County.[3] The affidavit further indicated that defendant had drugs on his person when arrested, and also had books which, to an experienced law enforcement officer, indicated that defendant was trafficking heavily in drugs.[4] It is submitted that an issuing magistrate could justifiably deduce from these facts that there was probable cause that defendant was keeping drugs at his home, and could thus

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[3] Counsel for defendant was prevented from examining officers about this. There was no claim that Franks v. Delaware, 438 u.S. 154 (1978), was implicated in this motion. This evidence of traffic was not considered in making the above Proposed Findings of Fact regarding the search of the vehicle. However, absent a Franks situation, this court cannot go behind the affidavit for a search warrant previously issued.

[4] A court is justified in giving consideration to inferences and deductions drawn by "trained officers". U.S. v. Cortez, 449 U.S. 411, 418 (1981).

issue a search warrant for defendant's home.

31. It is therefore submitted that the search warrant was not improperly issued, and the evidence found at defendant's home was properly seized.

RECOMMENDED CONCLUSION

32. For the foregoing reasons, it is recommended that the defendant's motion to suppress be denied in its entirety.

All parties are advised that all objections to this report and recommendation must be filed within ten (10) days or such objections may be deemed waived by the District Court. Additionally, such a failure to file within ten (10) days may be treated as a waiver of the right to appeal the District Court's order hereon. U.S. v. Walters, 639 F.2d 927 (6th Cir. 1981); Patterson v. Mintzes, 717 F.2d 284 (6th Cir. 1983); Thomas v. Arn, 474 U.S. 140 (1985); see also FED. R. CIV. P. 72(b).

Respectfully submitted: This 12th day of September, 1990.

JAMES H. ALLEN,
United States Magistrate

SEARCH WARRANT

State of Tennessee
Obion County

TO THE SHERIFF, ANY CONSTABLE OR ANY POLICE OFFICER OF SAID COUNTY, Proof by affidavit having been made before me by Larry Ross, Trooper, that there is probable cause for believing that William D. Sanders has/have in his/her/their possession cocaine, marijuana, other controlled substances, firearms and ammunition and all records, books, ledgers and devices used in the manufacture, sale, distribution or storage of said cocaine, marijuana, other controlled substances, firearms and ammunition . . . . . to be searched for in accordance with the Laws of the State of Tennessee, upon the following described property namely: white wood framed house with black trim, and all persons, vehicles and outbuildings located on said premises. Said property

can be found by travelling south of Hwy. 45E from the South Fulton City Hall for approximately 4.8 miles to the intersection of Hwy. 45E and Wolf Creek Road, proceed west on Wolf Creek Road for approximately 0.8 miles where said property is located on the south side of Wolf Creek Road, this being the residence of William D. Sanders, located in the 16th Civil District in Obion County, Tn. being the premises occupied by William D. Sanders, situate in Obion County, Tennessee, you are therefore commanded to make immediate search of the person and premises herein above described for the following property: cocaine, marijuana, other controlled substances, firearms and ammunition and all records, books, ledgers and devices used in the manufacture, sale, distribution or storage of said cocaine, marijuana, other controlled substances, firearms and ammunition . . . . . .

and if you find the same or any part thereof, to bring it forthwith before me, at my office in Union City, of said County and State.

This 10th day of March, 1990.

_____ Title Judge Court Circuit

Signature of Judge or Magistrate

Issued on March 10, 1990 12:10 P.M.

To: Larry Ross, THP

_ _ _ _ _ _ _ _('s) COPY

AFFIDAVIT

STATE OF TENNESSEE
COUNTY OF OBION

Personally appeared before me Trooper Larry Ross and made oath that he has good ground and belief, and does believe that William D. Sanders is/are in possession of the following described property, namely: cocaine, marijuana and other controlled substances and firearms and ammunition and all records, books, ledgers and devices used in the manufacture, sale, distribution or storage of said cocaine, marijuana, controlled substances, firearms and ammunition . . . . . to be searched for in accordance with the Laws of the State of Tennessee, upon the following described premises, namely: A white wood framed house with black trim and all persons, vehicles and outbuildings located on said premises. Said pre-

mises can be found by traveling south on Highway 45E from the South Fulton City Hall for approximately 4.8 miles to the intersection of Highway 45E and Wolfe Creek Road; proceed west on Wolfe Creek Road for approximately 0.8 mile where said premises is located on the south side of Wolfe Creek Road. This being the residence of William D. Sanders located in the 16th Civil District in Obion County, Tennessee

and his reasons for such belief are that affiant has [observed] [received information from] _____

(Here put facts and observations leading to belief of grounds for warrant)

(See Attached Affidavit)

_____

_____

_____

_____

_____ . . . .

Furthermore, _____

(Here put additional infor-

_____

mation, or report of stolen property

---

described as above with time and place)

He therefore complains and asks that a warrant issue to search the person and premises of the said William D. Sanders above described in said County, where he believes said personal property above is now possessed.

Trooper Larry Ross
(Signature of officer)
(Affiant)

Sworn to and subscribed before me this 10th day of March, 1990.

(Signature of Judge or Magistrate)

Title: Judge Court: Circuit

Obion County, Tennessee.

STATE OF TENNESSEE

_____ County.

STATE OF TENNESSEE

vs.

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

OFFICER'S RETURN

The within warrant came to hand, I executed it on this ___ day of _____, 19__, by searching the person(s) and premises herein described, by taking therefrom and bringing before _____

Title: _____

Court: _____

The following: (Here desribe property seized)

See attached inventory sheet.

_____

_____

Signed: _____
Sheriff (or constable) (or officer)

_____ County, Tennessee.

_____

JUDGMENT ON WARRANT

Due and proper return having been made of the within warrant, the property

seized as described in the said return, shall be retained, subject to the orders of the _____ Court of _____ County, and the within warrant, affidavit, and return shall be filed in the office of the Clerk of said Court.

This ____ day of _____, 19___.

Signed: _____
Title: _____
Court: _____

On 3-9-90, law enforcement officers began a surveillance on the residence of William Sanders located at Rt. 2, Box 105, Wolf Creek Rd., McConnell Community, Obion County, Tenn. William Sanders is known to law enforcement officers to be a member of the Hell's Angel's Motorcycle Club, Kentucky Chapter. Lt. Jerry Vastbinder received information within the past two months that a Sanders resident on Wolf Creek Rd. in the McConnell Community was dealing in narcotics and stolen property. Lt. Vastbinder further has conducted driveby surveillances of the residence of Sanders and recorded several vehicle registrations of the vehicles parked at the residence. Upon checking the registrations of the vehicles, Lt. Vastbinder determined that several of the registered owners were reported to be involved in drug trafficking in the Obion County area.

While conducting the surveillance of the residence on this date (3-9-90, at approximately 8 P.M.), Barry Callahan, S/A, TABC, and Bart McEntire, S/A, ATF, observed two vehicles arrive at the residence. The persons that arrived at the residence stayed for a very short time and then left. At approximately 8:30 P.M., S/A McEntire and Callahan observed Sanders exit his residence carrying a shirt and other items. Sanders placed these items in a pickup truck in the driveway of the residence. Sanders then returned to the residence and approximately 5 minutes later exited carrying a green cloth bag. Sanders then departed the residence in the truck. S/A McEntire radioed Trooper Larry Ross, THP, to request that Trooper Ross determine the vehicle registration of the truck. Trooper Ross pulled in behind the truck and observed the driver of the vehicle, William Sanders, driving the ve-

hicle in an unsafe manner by veering across the center line and tailgating a vehicle driven in front of Sanders. Trooper Ross radioed and advised Lt. Jerry Vastbinder of the driving violations and requested that Lt. Vastbinder stop the vehicle. Lt. Vastbinder and Deputy N. Sadler stopped the vehicle at the intersection of Purchase Pkway and U.S. 51. Deputy Sadler upon approaching the vehicle observed a revolver in a holster in the front seat next to Sanders. Lt. Vastbinder and Deputy Sadler at this time arrested William Sanders for illegal possession of a weapon, to wit, a firearm. After placing William Sanders under arrest, Deputy Sadler searched Sanders' vehicle and found a packet of white powder in the pocket of a shirt that way laying on the seat of the vehicle, beside Sanders. This white powder field tested positive as cocaine. A further search of

the vehicle produced a small quantity of marijuana and drug paraphernalia. In addition, several books were found, one of which contains numerous numerical accounts being added and subtracted. Your affiant knows the numerical accounts are consistent with amounts normally charged by drug dealers for an ounce of cocaine or methamphetaine. The total amounts of these additions and subtractions total over $23,000.00.

Your affiant therefore believes that presently at this time, based on the following facts and circumstances, William Sanders has stored in his residence at Rt. #2, Box 105, Wolf Creek Rd., cocaine, marijuana, cash and other items associated with drug trafficking. Further, your affiant also has information that at this time the residence is still occupied by at least one female. That due to the arrest of the Sanders subject and the female

being present at the residence, that evidence of the previously mentioned crimes, illegal possession of dangerous drugs, may be destroyed.

AFFIDAVIT

I, Bart McEntire, being duly sworn state as follows:

I am a Special Agent with the Bureau of Alcohol, Tobacco and Firearms assigned to the Memphis, Tennessee.

On March 9, 1990, William D. Sanders was arrested by the Obion County Sheriff's Department on Hwy. 45E, carrying a 44 caliber revolver and approximately 2 grams of cocaine. On March 10, 1990 a state search warrant was executed on the residence of William D. Sanders, located on Wolf Creek Road in the McConnell Community of Obion County. During the search of the residence, approximately 90 grams of cocaine was located in a green tackle box in William Sanders bedroom. In addition, two firearms, a Browning 9 mm pistol, and a 32 caliber Charter Arms pistol were located in the proximity of the cocaine. Further-

more, approximately $1200 in cash was found in a false bottom STP container. The affiant knows this information of his own personal knowledge by being present during the execution of the search warrant and speaking personally to Lt. Jerry Vastbinder the arresting officer involved on the March 9, 1990 arrest.

_____
Bart McEntire

Sworn to and subscribed
before me this 12th day
of March, 1990, at 1:40 P.M.

_____
Honorable James Allen
U.S. Magistrate

Amendment IV - United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV - United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for Pres-

ident and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an

officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or

any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.

(a) PLEADINGS AND MOTIONS. Pleadings in criminal proceedings shall be the indictment and the information and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) PRETRIAL MOTIONS. Any defense, objection, or request which is capable of determination without the trial of the

general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

(c) MOTION DATE. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.

(d) NOTICE BY THE GOVERNMENT OF THE INTENTION TO USE EVIDENCE.

(1) At the Discretion of the Government. At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule.

(2) At the Request of the Defendant. At the arraignment or as soon thereafter as is practicable the de-

fendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.

(e) RULING ON MOTION. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(f) EFFECT OF FAILURE TO RAISE DEFENSES OR OBJECTIONS. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

(g) RECORDS. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.

(h) EFFECT OF DETERMINATION. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information. Nothing in

this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.

(i) PRODUCTION OF STATEMENTS AT SUPPRESSION HEARING. Except as herein provided, rule 26.2 shall apply at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer shall be deemed a witness called by the government, and upon a claim of privilege the court shall excise the portions of the statement containing privileged matter.

Rule 41. Search and Seizure.

(a) AUTHORITY TO ISSUE WARRANT. Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.

(b) PROPERTY OR PERSONS WHICH MAY

BE SEIZED WITH A WARRANT. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) ISSUANCE AND CONTENTS.

(1) Warrant upon affidavit. A warrant other than a warrant upon oral testimony under Paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the

federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, that magistrate or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil of-

ficer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(2) Warrant upon oral testimony.

(A) General rule. If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) Application. The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original war-

rant. The Federal magistrate may direct that the warrant be modified.

(C) Issuance. If the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The

finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) Recording and certification of testimony. When a caller informs the Federal magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant.

Otherwise, a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate shall file a signed copy with the court.

(E) Contents. The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(F) Additional rule for execution. The person who executes the warrant shall enter the exact time of execution on the

face of the duplicate original warrant.

(G) Motion to suppress precluded. Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

(d) EXECUTION AND RETURN WITH INVENTORY. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any

property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) MOTION FOR RETURN OF PROPERTY. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to

lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) MOTION TO SUPPRESS. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

(g) RETURN OF PAPERS TO CLERK. The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and

shall file them with the clerk of the district court for the district in which the property was seized.

(h) SCOPE AND DEFINITION. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 A.M. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the

Attorney General to request the issuance of a search warrant.